No. 84-1480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida,

Petitioner,

—v.—

DAVID WAYNE GREENFIELD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION

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The American Civil Liberties Union respectfully moves for leave to file the within brief as amicus curiae. Respondent, but not petitioner, has consented to the filing of this brief.

The American Civil Liberties Union is a non-profit organization with over 250,000 members nationwide devoted to the protection of civil rights and liberties of all Americans. One of the most cherished of these rights, characterized by this Court as "one of the great landmarks in man's struggle to make himself civilized," Ullman v. United States, 350 U.S. 422, 426 (1956), is the privilege against self-incrimination. The ACLU and its affiliates have appeared before this Court in numerous cases in which the Court has given depth and meaning to the fifth amendment privilege. E.g., Slochower v. Board of Higher Education, 350 U.S. 551 (1956); Malloy v. Hogan, 378 U.S. 1 (1964); Spevack v. Klein, 385 U.S. 511 (1967); Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

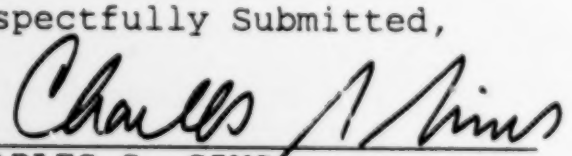
Although the parties and the court below have examined at length respondent's right to remain silent, as articulated in

Doyle v. Ohio, 426 U.S. 610 (1976), we believe they have devoted insufficient attention to the fifth amendment privilege upon which Doyle and Miranda v. Arizona, 384 U.S. 436 (1966), rest. In this case, use of and comment on respondent's request for counsel and invocation of the fifth amendment privilege violated both the privilege against self-incrimination and the rule of Doyle v. Ohio.

We believe that the analysis that follows may be of assistance in resolving these questions. Accordingly, we urge that the Court grant leave to file this brief.

Dated: September 5, 1985

Respectfully Submitted,



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INTEREST OF AMICUS CURIAE

The interest of amicus curiae appears in the foregoing motion.

SUMMARY OF ARGUMENT

Petitioner's use of and emphasis on respondent's post-Miranda silence in this case was impermissible for two independent reasons.

First, use of respondent's silence violated his fifth amendment privilege against compulsory self-incrimination. The privilege, applicable to the states under the fourteenth amendment, has been breached because respondent's silence was obtained under compulsion without a fifth-amendment waiver and was offered as a link in the chain of evidence establishing his guilt. Point I, infra.

Moreover, comment on respondent's silence in this case also contravened the

rule, established in Doyle v. Ohio, prohibiting use of the defendant's silence after Miranda warnings have been given. The rule of Doyle was abridged as well because respondent was led erroneously by the Miranda warnings to believe that his silence would not be admissible at trial on the issue of sanity or insanity. Point II, infra.

Regrettably, the parties' narrow focus on the rule of Doyle v. Ohio has pretermitted analysis of respondent's fifth amendment rights. Accordingly, we establish first that use of respondent's silence in these circumstances constituted a violation of the fifth amendment privilege against self-incrimination. We then demonstrate that the rule of Doyle applies with full force to post-Miranda silence offered in support of the defendant's sanity.

ARGUMENT

I. USE OF RESPONDENT'S SILENCE AFTER MIRANDA WARNINGS WERE GIVEN VIOLATED THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION

The fifth amendment to the United States Constitution declares that no person shall "be compelled in any criminal case to be a witness against himself." This Court has characterized the fundamental constitutional command that "the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth," Miranda v. Arizona, 384 U.S. 436, 460 (1966), as "one of the most valuable prerogatives of the citizen." Brown v. Walker, 161 U.S. 591, 610 (1896); see Slochower v. Board of Higher Education, 350 U.S. 551, 557 (1956).

The proscription on "compulsory extortion of a man's own testimony," Boyd v. United States, 116 U.S. 616, 630 (1886), prohibits use by the prosecution of "an accused's communications, whatever form they might take, and the compulsion of responses which are also communications." Schmerber v. California, 384 U.S. 757, 763-64 (1966). The privilege applies when (1) "communications or testimony," see South Dakota v. Neville, 459 U.S. 553, 561 (1983), are obtained (2) by "impermissible coercion," id. at 662, and would (3) "furnish a link in the chain of evidence that could lead to prosecution." Maness v. Meyers, 419 U.S 449, 461 (1975); Hoffman v. United States, 341 U.S. 479, 486 (1951); Blau v. United States, 340 U.S. 159, 161 (1950).

In this case, respondent's assertion of his desire to remain silent and the ensuing silence -- in short, his invocation of the fifth amendment privilege -- were offered as evidence of his sanity. As we demonstrate below, this substantive use of the fifth amendment privilege clearly violated the privilege itself.

In brief, respondent's silence was plainly "compelled" within the meaning of the fifth amendment. Respondent's arrest, together with the Miranda warning that his statements could and would be used against him at trial (JA-73), created a powerful impetus to remain silent and one which respondent obviously heeded. The arrest, moreover, rendered respondent incapable of avoiding transmission of such silence, and the message the prosecution urged it carried, to the arresting officers.

Both his answers and silence were also introduced for their communicative or testimonial value. Petitioner offered this evidence as evincing respondent's evident understanding of the Miranda warnings, his appreciation of the significance of remaining silent, and his capacity to act in conformance with this understanding. This Court has characterized similar evidence elicited during psychiatric examination as testimonial, see Estelle v. Smith, 451 U.S. 454, 463-64 & n.9 (1981), and no basis is suggested for treating respondent's answers and silence otherwise here.

Finally, petitioner offered this evidence as a link in the chain establishing respondent's guilt. Statements introduced to "achieve the consequence of eliminating an insanity defense and thus obtaining a conviction," United States v. Byers, 740

F.2d 1104, 1113 (D.C. Cir.) (en banc), cert. denied, 104 S. Ct. 717 (1984), comprise links in the chain toward guilt and are subject to the fifth amendment privilege. Walker v. Butterworth, 599 F.2d 1074, 1081-84 (1st Cir.), cert. denied, 444 U.S. 937 (1979).

Indeed, the prosecutor's comment in this case is legally indistinguishable from comment this Court has condemned for decades. The Court has long proscribed use of the defendant's assertion of the privilege in a criminal case to establish the element of mens rea.[1] In a transparent

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[1]See Griffin v. California, 380 U.S. 609, 613-14 (1965); Grunewald v. United States, 353 U.S. 391, 421 (1957) (dictum); Slochower v. Board of Education, 350 U.S. 551, 559 (1956); Johnson v. United States, 318 U.S. 189, 196-97 (1943); United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 112 (1927) (dictum); United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 154-56 (1923) (dictum).

sleight of hand, the prosecutor in this case offered respondent's assertion of the privilege as evidence that respondent was capable of distinguishing right from wrong -- and was therefore sane -- at the time of the offense. The predicate to this argument is obviously the impermissible inference, adduced from respondent's assertion of the privilege, that he knew his conduct was wrong and was therefore capable of the requisite mens rea.

Because petitioner's failure to address fifth amendment issues creates errors of logic in its argument, we demonstrate in detail in Point I(A) below that respondent's answers and silence in response to Miranda warnings were privileged under the fifth amendment. We then establish in Point I(B) that the privilege was not waived or otherwise rendered ineffective

because respondent introduced expert psychiatric testimony on the issue of his sanity.

A. Respondent's Post-Miranda Answers and Silence Were Privileged Under the Fifth Amendment

The use of respondent's assertion of the privilege against self-incrimination to establish his sanity constituted a clear violation of the privilege itself. We turn to each of the elements for invocation of the privilege:

1. Compulsion

Respondent's answers to the Miranda questions and his ensuing silence were plainly "compelled" within the meaning of the fifth amendment. At the time in question, respondent had been arrested and

warned that "[y]ou have a right to remain silent" and "[a]nything you say can and will be used against you in a court of law" (JA-71, 73). The arrest, and subsequent warnings that anything said could and would be used at trial, created patent and substantial pressures to remain silent. See Johnson v. United States, 318 U.S. 189, 197-199 (1943) (similar conclusion for instruction at trial that defendant may claim privilege). Because respondent had been placed in custody, transmission to the arresting officers of the message claimed to inhere in his silence was unavoidable. Accordingly, elicitation of respondent's silence was "compelled" within the meaning of the fifth amendment.

Nor, contrary to petitioner's suggestion, is the giving of Miranda warnings

necessary to this conclusion.[2] It has been clear since Bram v. United States, 168 U.S. 532 (1897), that the fifth amendment privilege attaches at the commencement of custody,[3] see Ziang Sung Wan v. United

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[2]Petitioner erroneously suggests that "respondent's desire for an attorney and decision to remain silent would clearly be admissible" had Miranda warnings not been administered. Br. at 19 (relying on Fletcher v. Weir, 455 U.S. 603 (1982) (per curiam)). The error stems from petitioner's failure to address or appreciate the fifth amendment issue. The defendant in Fletcher testified, thereby waiving any fifth amendment privilege proscribing comment on prior silence. Jenkins v. Anderson, 447 U.S. 231, 235-36 (1980); Raffel v. United States, 271 U.S. 494, 496-97 (1926); see Brown v. United States, 356 U.S. 148, 154-55 (1958) ("the breadth of his waiver is determined by the scope of relevant cross-examination"). When the defendant does not testify -- as respondent here did not -- supervening fifth amendment constraints remain in force, and comment on the defendant's post-custodial silence is impermissible.

[3]See Jenkins v. Anderson, 447 U.S. 231, 244 (1980) (Stevens, J., concurring in the judgment) ("[f]or in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled").

States, 266 U.S. 1, 14-15 (1924), and proscribes affirmative use of all compelled communications of the accused. The Miranda warnings simply impart knowledge of the privilege. Independent knowledge of the privilege, of course, imparts similar pressure to remain silent. Accordingly, when the accused does not testify, testimonial use of post-custodial silence would be subject to applicable fifth amendment strictures even in the absence of Miranda warnings.[4]

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[4]Thus, petitioner plainly errs by suggesting that any prohibition on the prosecutor's comment on post-custodial silence would "penalize the state" for promptly administering Miranda warnings. Br. at 19. To the contrary, when, as here, the defendant does not testify, such comment would be prohibited by force of the fifth amendment without regard for the giving of Miranda warnings.

In any event, petitioner can hardly be heard to complain that, had respondent testified, it would have been denied the "benefit" of violating Miranda -- a benefit to which there is obviously no lawful entitlement.

Because Miranda warnings were given, however, the analysis is quite simple. Respondent's silence in the wake of Miranda warnings was "compelled" within the meaning of the fifth amendment.

2. Communication or Testimony

Likewise, respondent's request for an attorney and invocation of the privilege were offered for their testimonial or communicative value. The use of silence for testimonial purposes is hardly novel. "Silence," as the Court concluded in United States ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923), "is often evidence of the most persuasive character." Id. at 153-54. The failure to deny an allegation when denial would be natural is frequently taken as

evidence of its truth,[5] and is the evidential equivalent of testimony to that effect.

Similarly, assertion of a statement or silence may impart additional implicit information. Thus, in Walker v. Butterworth, 599 F.2d 1074 (1st Cir.), cert. denied, 444 U.S. 937 (1979), the First Circuit held that mandatory personal exercise by the defendant of the right of peremptory challenge violates the privilege against self-incrimination. The prosecutor in Butterworth, like the prosecutor here, urged that

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[5]United States v. Hale, 422 U.S. 171, 176 (1975); 3A J. Wigmore, Evidence § 1042 (J. Chadbourn rev. 1970), quoted in Baxter v. Palmigiano, 425 U.S. 308, 319 n.3 (1976); see Grunewald v. United States, 353 U.S. 391, 421-23 (1957); Adamson v. California, 332 U.S. 46, 56 (1947); United States ex rel. Vajtauer v. Commisisoner of Immigration, 273 U.S. 103, 111-12 (1927).

the defendant's exercise of peremptory challenges be taken as evidence of the defendant's sanity. In a closing argument bearing striking similarity to that at issue here, the prosecutor exhorted:

> Do you think [the defendant] knew what he was doing when he stood up there and said, "I am content with this juror? I am content with this juror? I am content with this juror?"

599 F.2d at 1076.

The First Circuit quite properly concluded that "Walker was obviously communicating his satisfaction with the individual jurors." Id. at 1082. In exercising these challenges, the court held,

> Walker was transmitting, against his will, an important message to the jury. Roughly translated, this message would read: "the accused can rationally and sanely communicate with his lawyer and make important trial decisions."

Id. (footnote omitted).[6]

With the simple substitution of respondent's request for an attorney and assertion of the fifth amendment privilege for the defendant's exercise of peremptory challenges in Walker, petitioner has made precisely the argument rebuffed by the First Circuit. These words were not, the court held, used for their "identifying characteristics," see United States v. Wade, 388 U.S. 218, 221-23 (1967), or

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[6]The First Circuit further observed:

> Of course, this transmitted message might be completely erroneous. Forcing one to exercise his peremptory challenges personally may well produce a dangerously incorrect impression of sanity precisely because the person is not communicating with entire independence and under his own free will.

599 F.2d at 1082 n.9.

for measurement of the defendant's "physical properties," United States v. Dionisio, 410 U.S. 1, 7 (1973). Rather,

> in the context of an insanity defense, the words necessarily take on an additional meaning and relate important and incriminating information. The content of the words and the mental processes that they necessarily embodied and revealed, conveyed an inescapable message to the jury.

599 F.2d at 1082-83.

Similarly, in Estelle v. Smith, 451 U.S. 454 (1981), this Court concluded that a defendant's communications during a pretrial psychiatric examination conducted for the purpose of assessing the defendant's future dangerousness were testimonial in nature. Id. at 463-65. The psychiatric prognosis, the Court reasoned, "rested on statements respondent made and remarks he omitted." Id. at 464. The fifth amendment privilege was therefore "directly involved

here because because the State used as evidence against respondent the substance of his disclosures during the pretrial psychiatric examination." Id. at 465; see South Dakota v. Neville, 459 U.S. 553, 561 n.12 (1983).

Respondent's assertions and silence were, in this case, plainly indistinguishable from those addressed in Estelle; indeed, as communications supporting an inference of sanity, their function was identical to that of communications offered in Estelle to support an inference of dangerousness. Nor is any meaningful distinction suggested between examination for dangerousness in Estelle and that for sanity here. Accordingly, respondent's request for an attorney and invocation of the privilege against self-incrimination were communications within the meaning of the fifth amendment privilege.

3. Link in the Chain of Evidence

The fifth amendment privilege "does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution." Maness v. Meyers, 419 U.S. 449, 461 (1975).[7]

Because mens rea is an element of the crime charged, statements tending to establish intent are both "information which would furnish a link in the chain of evidence that could lead to prosecution"

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[7]See Hoffman v. United States, 341 U.S. 479, 486 (1951); Blau v. United States, 340 U.S. 159, 161 (1950); United States v. Burr, 25 F. Cas. 38 (C.C.D. Va. 1807) (No. 14,692e).

and evidence which the accused may "reasonably believe[] could be used against him in a criminal prosecution." Maness, supra, 419 U.S. at 461. Accordingly, use of the defendant's assertion of the privilege to support an inference that he knew his conduct was wrong is prohibited.

So, too, is use of the defendant's invocation of the privilege to establish capacity to possess the requisite mens rea -- in short, the defendant's sanity -- prohibited. Assertion of the privilege is offered in both cases on the issue of guilt. Indeed, this conclusion flows a fortiori from Estelle v. Smith, supra, which "discern[ed] no basis to distinguish between the guilt and penalty phases of" a capital murder trial "so far as the protection of the Fifth Amendment privilege is concerned." 451 U.S. at 462. Assessment of

the defendant's mental state at the penalty phase in Estelle obviously bore less directly on guilt than does a similar assessment of the defendant's sanity.[8]

Moreover, the predicate to petitioner's theory of admissibility itself rests on an impermissible inference derived from respondent's invocation of the privilege. The prosecutor sought to establish respondent's capacity to distinguish right from wrong and to appreciate "the nature of his act or its consequences" (JA-11 n.2). Respondent's assertion of the privilege, the prosecutor effectively urged, revealed that respondent appreciated the wrongful-

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[8]See United States v. Byers, supra, 740 F.2d at 1112-13 ("A similar conclusion would seem compelled with regard to statements to a psychiatrist that are introduced to achieve the consequence of eliminating an insanity defense and thus obtaining a conviction.").

ness of his actions, and thus that he had the capacity to make such distinctions. The predicate for this argument, of course, is the impermissible inference that respondent's invocation of the privilege could be taken as evidence of belief that his actions were wrong. Slochower, supra, 350 U.S. at 557-58.

For these reasons, absent waiver of the privilege, use of and comment on respondent's answers and silence violated the privilege against self-incrimination.

B. The Privilege Applicable To Post-Custodial Communications Was Not Waived or Otherwise Rendered Inapplicable By Respondent's Use of Expert Psychiatric Testimony

This Court has suggested, without deciding, that a defendant who "asserts the insanity defense and introduces supporting psychiatric testimony . . . can be required

to submit to a sanity examination conducted by the prosecution's psychiatrist." Estelle v. Smith, supra, 451 U.S. at 465.[9] Any such suspension of the privilege, however, does not apply to communications elicited in violation of the privilege when the defendant is in custody following arrest.

Relaxation of the privilege for such expert psychiatric examination rests on three grounds, none of which has application here. When the defense offers expert psychiatric testimony, expert examination of the defendant may afford "the only effective means [the State] has of contro-

[9] See, e.g., Taylor v. Best, 746 F.2d 220, 223-24 (4th Cir. 1984); United States v. Byers, supra, 740 F.2d at 1109-15; Watters v. Hubbard, 725 F.2d 381, 384-85 (6th Cir.), cert. denied, 105 S. Ct. 133 (1984); United States v. Madrid, 673 F.2d 1114, 1121 (10th Cir.), cert. denied, 459 U.S. 843 (1982); Estelle v. Smith, supra, 451 U.S. at 465-66 and cases cited therein.

verting his proof on an issue that he interjected into the case." Estelle, 451 U.S. at 465. See United States v. Bohle, 445 F.2d 54, 66 (7th Cir. 1971) (expert examination permitted "because of the great importance of expert testimony on the issue of insanity"). Moreover, because such examination is conducted by an expert under professional conditions, communications upon which the expert relies may be expected to bear a reliable relationship to the defendant's mental state. Finally, any such evidence is introduced at trial through expert testimony, affording explanation, guidance, and perspective to the jury. See Walker v. Butterworth, supra, 599 F.2d at 1083 ("resulting psychiatric analysis sufficiently neutral and buffered by expertise to equate it with the medical examination of physical characteristics").

These considerations are without relevance to post-custodial communications playing no part in psychiatric evaluation; indeed, they make plain the applicability of the privilege to such communications. Although the prosecution introduced expert psychiatric testimony in rebuttal (JA-11-12), respondent's invocation of the privilege against self-incrimination played no role in this testimony (JA-36 n.9). Accordingly, "[t]his is not a situation where there is an important interest to be served by permitting reliable and expert evidence." Walker, supra, 599 F.2d at 1084.

Quite to the contrary, the thread of logic linking respondent's assertion of the privilege and his sanity is gossamer thin -- if not altogether nonexistent -- precisely because no professional has determined that respondent's sanity and invoca-

tion of the privilege bear any necessary relationship.[10] The prosecutor's theory was, at bottom, amateurish speculation lacking expert evaluation or guidance, offered in its raw form to the jury without opportunity for cross-examination or explanation.

Under these circumstances, no purpose is served by circumvention of the fifth amendment privilege. Rather, denial of the privilege invites unnecessary, and inevitably misleading, speculation on inferences to be drawn from respondent's constitutional right to remain silent. See Stewart v. United States, 366 U.S. 1, 3-6 (1961). This Court has never authorized the use of

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[10] Cf. Youngberg v. Romeo, 457 U.S. 307, 323 (1982) (encroachment on liberty interests in safety and freedom from restraint must be based on exercise of professional judgment).

such compelled communications neither relied upon nor introduced through psychiatric expert testimony; certainly no basis for doing so arises here.[11]

In conclusion, the privilege against self-incrimination prohibited petitioner's affirmative use of respondent's post-custodial remarks and silence as evidence of his sanity.

II. THE RULE OF DOYLE V. OHIO APPLIES WITH FULL FORCE TO USE AT TRIAL OF POST-MIRANDA SILENCE TO ESTABLISH THE DEFENDANT'S SANITY

The rule of Doyle v. Ohio, 426 U.S. 610 (1976), likewise forbade use of and comment on respondent's request for counsel

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[11] The questions of affirmative use of the defendant's post-Miranda silence in expert testimony for the prosecution, and use of such silence to impeach expert testimony for the defense, are not before this Court.

and invocation of the privilege against self-incrimination as evidence of his sanity.

By its plain language, Doyle applies with full force to comment on the defendant's silence to establish sanity. This Court reasoned in Doyle that while "the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." 426 U.S. at 618. In these circumstances, the Court held, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Id. (footnote omitted).

The warnings themselves make no distinction between use of silence to attack credibility and to establish guilt. Any

assurances made by the warnings as to credibility therefore apply with equal force to inferences of guilt. Indeed, such assurances apply with greater vigor to guilt, since the underlying privilege against self-incrimination permits impeachment by prior silence when the defendant testifies, Jenkins v. Anderson, 447 U.S. 231, 235-38 (1980); Raffel v. United States, 271 U.S. 494, 496-97 (1926), but proscribes inferences of guilt without regard for whether the defendant testifies. Grunewald v. United States, 353 U.S. 391, 421 (1957).

Accordingly, the issue is not, as petitioner contends, whether the Eleventh Circuit "extended" Doyle beyond its proper compass. To the contrary, the issue is whether a niche is to be carved from Doyle for inferences relating to sanity. As we

demonstrate below, none of the arguments for exempting inferences of sanity from the rule of Doyle has merit.

A. Considerations Relating To Probativeness of Inferences Drawn from Silence to the Issue of Sanity Do Not Justify Suspension of the Rule of Doyle

Contrary to petitioner's suggestion, any purportedly probative value respondent's request for counsel and invocation of the fifth amendment privilege may have had on the issue of his sanity is not ground for suspension of the holding of Doyle.

First, the Court in Doyle rejected the argument now advanced by petitioner in circumstances considerably stronger than these. Writing for the dissent in Doyle, Justice Stevens urged, with sounder basis

than petitioner here, that Doyle's post-Miranda silence had substantial probative value, in part because the record belied any reliance by him on the Miranda warnings, 426 U.S. at 622-24 (Stevens, J., dissenting), and in part because such reliance should not be presumed.[12] Setting aside such reliance in the first stage of his argument, Justice Stevens reasoned that Doyle's silence was therefore "almost inexplicable" and "tantamount to a prior inconsistent statement admissible for purposes of impeachment." Id. at 621-22.

Although the majority in Doyle expressed dubiety at the theory that Doyle's silence, apart from reliance on Miranda

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[12]Because reliance on Miranda warnings is established here, the case for probative value of respondent's silence is weaker than that in Doyle.

warnings, had probative value,[13] it also rejected this consideration as irrelevant:

> Nor is it necessary, in view of our holding above, to express an opinion on the probative value for impeachment purposes of petitioners' silence. We note only that the Hale court considered silence at the time of arrest likely to be ambiguous and thus of dubious probative value.

426 U.S. at 617 n.8.

The underlying probative value of Doyle's silence, apart from Miranda warnings, was unnecessary to assess, of course, because the Court declined to embark on the first stage of Justice Stevens' argument, and therefore found no need to reach the second stage. Rather, the Court held that

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[13]Relying on United States v. Hale, 422 U.S. 171, 177 (1975), the Court "noted that silence at the time of arrest may be inherently ambiguous even apart from the effect of Miranda warnings, for in a given case there may be several explanations for the silence that are consistent with the existence of an exculpatory explanation." Doyle v. Ohio, supra, 426 U.S. at 617 n.8.

the jury may not be informed, through cross-examination, of the defendant's post-Miranda silence. This conclusion, in turn, followed because the Court regarded it as fundamentally unfair to impugn an inconsistency based on silence after promising implicitly that no such use would be made of the defendant's silence.[14]

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[14]Thus the Court explained in footnote 10:

> The dissenting opinion relies on the fact that petitioners in this case, when cross-examined about their silence, did not offer reliance on Miranda warnings as a justification. But the error we perceive lies in the cross-examination on this question, thereby implying an inconsistency that the jury might construe as evidence of guilt. After an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that right.

426 U.S. at 619 n.10 (emphasis added).

Accordingly, the underlying probative value of silence, absent reliance on Miranda warnings, was not relevant under Doyle. Moreover, this conclusion acquires renewed force when, as here, the defendant actually relied on Miranda warnings. For these reasons, we believe that the Eleventh Circuit below erred by engaging in speculation on the probativeness of respondent's silence. Greenfield v. Wainwright, 741 F.2d 329, 333-34 (11th Cir. 1984) (JA-21-24). Although we agree that respondent's request for counsel and invocation of the fifth amendment privilege had little if any relevance to his sanity, this inquiry is simply beside the point -- and is certainly so when, as here, actual reliance on the Miranda warnings is shown.

Finally, there is sound reason for

excluding such freewheeling speculation on the probative value, if any, of the defendant's invocation of the fifth amendment privilege. The omnipresent danger in this case -- as in all cases in which inferences are invited from an assertion of the privilege -- is "that the jury might construe [silence] as evidence of guilt." Doyle, 426 U.S. at 619 n.10. The danger is most acute when, again as here, the defendant has in fact invoked the fifth amendment privilege.

For these reasons, speculation on the probative value of respondent's invocation of the fifth amendment privilege is no warrant for failing to apply the rule of Doyle v. Ohio to inferences regarding the defendant's sanity.

B. Considerations of "Deterrence" Also Do Not Justify Suspension of the Rule of Doyle

Relying erroneously on Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982), cert. denied, 460 U.S. 1043 (1983), petitioner also urges that this Court take cognizance of an allegedly marginal deterrent effect on the exercise of respondent's constitutional rights caused by evidential use of his fifth amendment privilege. This argument, too, lacks merit.

The prosecution in Sulie offered the defendant's request for counsel as evidence of his sanity. Dismissing without serious consideration Judge Cudahy's argument that the Miranda warnings convey implicit assurance that a request for counsel will not be used against the defendant -- just as they convey similar assurance that silence will

not be so used[15] -- the Sulie court disgarded the holding of Doyle as inapposite.

Accordingly, the court turned to any burden on Sulie's right to counsel. Because formal judicial proceedings had not yet commenced, see Moore v. Illinois, 434

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[15]Judge Cudahy reasoned:

> These same considerations [addressed in Doyle] apply when the defendant's response to the Miranda warnings is not silence but a request to contact a lawyer. Because the State is required under Miranda to advise an accused of both the right to remain silent and the right to counsel, exercise of the latter right is as "insolubly ambiguous" as the exercise of the former right. More importantly for my principal point, just as the Miranda warnings implicitly assure an accused that exercise of the announced right to silence will carry no penalty, so too must they implicitly give assurance that a defendant's exercise of the announced right to counsel will carry no penalty.

689 F.2d at 132 (Cudahy, J., dissenting).

U.S. 220, 226-27 (1977), the sixth amendment right to counsel had not attached; at issue was rather the right to counsel at interrogation promised by Miranda. The court theorized that any burden on this right -- characterized as a "judge-made enforcement device" for ensuring compliance with the fifth amendment privilege -- should be assessed in light of "how much the exercise of the right to remain silent would be deterred if a suspect knew that a request for a lawyer could be used as evidence of his sanity." 689 F.2d at 130.

Notwithstanding petitioner's legal gymnastics importing the economic theory of law into yet another arena of constitutional doctrine,[16] such a deterrence analysis

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[16] Cf. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics").

has no place in this case. The Seventh Circuit regarded Doyle as inapposite because that court understood the Miranda warnings to convey no implicit promise to forbear from using the defendant's request for counsel at trial. Regardless of whether this crabbed reading of Doyle has merit, it has no applicability here. The prosecutor here commented on respondent's invocation of the privilege as well as his request for counsel, bringing the case squarely within the compass of Doyle. No right-to-counsel theory has been advanced in this case; consequently, this Court has no occasion to consider whether -- were the case to rest on right-to-counsel foundations -- the appropriate mode of analysis would entail consideration of the speculative deterrent effect caused by comment on

the defendant's request for counsel.[17]

Nor is any deterrent analysis appropriate under Doyle itself. This Court held in Doyle that comment on the right of silence promised by the Miranda warning is "fundamentally unfair and a deprivation of due process." 426 U.S. at 618. Fundamental due process constraints on state criminal proceedings are not "enforcement device[s]." They are, of course, constitutional rights. Their efficacy, until the due process clause is amended, does not

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[17]There is, moreover, strong reason for believing that application of the Seventh Circuit's "deterrence" analysis was legal error even in the "Miranda right-to-counsel" setting. When the defendant, as in Sulie, has been arrested, taken into custody, and has requested counsel, the right to counsel identified in Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964), attaches, after which point the analysis of Griffin v. California, 380 U.S. 609, 614 (1965), would apply with equal force to comment impairing the right to counsel.

turn on speculation whether the deterrent value of these rights exceeds the quality of evidence gained by their violation.

CONCLUSION

For these reasons, we urge that this Court affirm the judgment of the Eleventh Circuit. Comment on respondent's post-Miranda silence in this case clearly violated the constitutional privilege against self-incrimination. Moreover, such comment also violated the rule of Doyle v. Ohio because respondent was led erroneously by the Miranda warnings to believe that his silence would be inadmissible at trial on the issue of sanity or insanity.

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Respectfully submitted,

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